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ALEXANDER L. STEVAS,
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Nos. 80-1798, 80-1808 and 81-91

IN THE

Supreme Court of the United States

October term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX—VOLUME II
(Nos. 80-1808 and 81-91)

Petitions for Certiorari Filed:
No. 80-1798: April 29, 1981
No. 80-1808: April 29, 1981
No. 81-91: July 14, 1981
Certiorari Granted October 5, 1981

Lewis K. Scott
David H. Wilson, Jr.
800 Pacific Building
520 S. W. Yamhill
Portland, Oregon 97204
(503) 226-6151
Counsel for Petitioner AGC

Thomas M. Triplett
1200 Standard Plaza
1100 S. W. 6th Avenue
Portland, Oregon 97204
(503) 222-9981
Counsel for Petitioner ABC

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Norton J. Come
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsyvania Avenue, N.W.
Washington, D.C. 20570
(202) 254-9430
Counsel for Respondent NLRB

Richard B. Corney
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97204
(503) 221-0611
Counsel for Respondent Engineers

John W. Prager, Jr.
4000 MacArthur Boulevard
Suite 900
Newport Beach, California 92660
(714) 752-6100
Counsel for Petitioner
Woelke & Romero

Abe S. Levy
Gordon K. Hubel
Lawrence Rosenzweig
3550 Wilshire Blvd.
Suite 1020
Los Angeles, California 90010
(213) 380-3140
Counsel for Respondent Carpenters

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NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

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JOINT APPENDIX—VOLUME II (Nos. 80-1808 and 81-91)

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APPENDIX A: ALLEGATIONS IN UNFAIR LABOR PRACTICE CHARGE

Before the National Labor Relations Board

(Charge filed by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. against International Union of Operating Engineers, Local No. 701)

The Union entered into a collective bargaining agreement which contains a subcontractor clause, a copy of which is attached, marked Exhibit "A" with the AGC. The Union has and continues to seek to enforce the provisions of said clause through the filing of grievances and otherwise and AGC continues to comply. Such conduct has occurred within the last six months and includes, but is not limited to, pursuing of a grievance with respect to H. A. Anderson Co. on a Clackamas, Oregon project on behalf of Fred Meyer; with respect to Ausland Construction, Inc. at a project in Klamath Falls; and with respect to Vik Construction Company at a Hewlett Packard project.

APPENDIX B: AMENDED COMPLAINT AND NOTICE OF HEARING

Before the National Labor Relations Board

International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

and

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.

It having been charged by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. that International Union of Operating Engineers, Local No. 701, AFL-CIO and Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein respectively called Local 701 and AGC and collectively called Respondents) have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges:

1.

The charge herein was filed on April 26, 1977, and a copy was served on Respondents by registered mail on or about April 29, 1977.

2.

(a) AGC is an association of employers engaged in all types of construction work throughout the entire state of Oregon and five counties in the southwestern portion of the state of Washington. The employer-members of AGC have delegated their collective bargaining authority to the AGC for the purpose, *inter alia*, of negotiating and entering collective bargaining contracts on behalf of its employer-members with

the bargaining representatives of their employees, including Local 701.

(b) During the past year, the employer-members of AGC in the course and conduct of their business, annually purchased goods, materials, and supplies valued in excess of $50,000 which were shipped to said employer-members directly from states in the United States other than the states of Oregon and Washington.

3.

AGC is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4.

Local 701 is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5.

On or about June 1, 1975, Local 701 and AGC entered into a written contract which expires May 31, 1980, and contains the following provisions:

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article,

unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

* * * * *

At all times material herein, and continuing to date hereof, Respondents have continued and are continuing to give effect to the aforesaid contract clauses and since on or about November 22, 1976, have reaffirmed the aforesaid contract clauses, and have attempted to enforce said contract clauses.

6.

By the aforesaid contract clauses as described in paragraph 5 above, Respondents entered into an agreement whereby AGC and its employer-members have agreed to cease and refrain from handling, using, selling , transporting, or otherwise dealing in the products of other employers and have agreed to cease doing business with other persons.

7.

The acts of Respondents described in paragraph 5 above, occuring in connection with the operations of AGC and its employer-members as described in paragraph 2 above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states of the United States, and have led and lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(e) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 1st day of November, 1977, at 10:00 A.M., in Room 300, Six Ten Broadway Building, 610 S. W. Broadway, Portland, Oregon, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise and give testimony.

Form NLRB-4668, Summary of Standard Procedures in

Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

YOU ARE FURTHER NOTIFIED THAT, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, each Respondent is required to file with the undersigned Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to this Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in said Complaint shall be deemed to be true and may be so found by the Board. Immediately upon the filing of its Answer, each Respondent shall serve a copy thereof on each of the other parties.

DATED at Seattle, Washington, this 20th day of September, 1977.

(Signature line omitted in printing)

APPENDIX C: ANSWER OF OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Before the National Labor Relations Board
(Title omitted in printing)

Respondent Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein "AGC") in answer to the Amended Complaint filed by the Regional Director, admits, denies and alleges as follows:

I

Respondent admits the allegations contained in paragraphs 1, 2, 3 and 4.

II

Answering paragraph 5 Respondent admits all allegations contained therein except Respondent denies that it has attempted to enforce Article VIII (quoted in paragraph 5) and denies that it has given effect to, reaffirmed, or attempted to enforce Article IX (quoted in paragraph 5).

III

Answering paragraphs 6 and 7, Respondent admits all allegations of fact contained therein. Those allegations in paragraphs 6 and 7 which are conclusions of law require no answer.

IV

Respondent alleges that, in order to minimize the potential liability of its members for breach of Article VIII, it intends to continue giving effect to that article until it is ordered by the Board or a court not to do so.

V

Respondent denies all allegations of fact not specifically admitted herein.

(Signature line omitted in printing)

APPENDIX D: ANSWER OF INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 701, AFL-CIO

Before the National Labor Relations Board
(Title omitted in printing)

For Answer to the Amended Complaint, International Union of Operating Engineers, Local No. 701, AFL-CIO, admits, denies, and alleges as follows:

I

Admits paragraphs 1, 2, 3, 4, and 5 of the Amended Complaint.

II

Denies paragraphs 6 and 7 of the Amended Complaint.

First Affirmative Defense

I

Article VIII, Section 1 of the Master Labor Agreement is protected by the construction industry proviso to Section 8(e) of the Act.

Second Affirmative Defense

I

No facts are alleged upon which to base a finding of unfair labor practices or a violation of Section 8(e) of the Act with respect to Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. or any of its members.

Third Affirmative Defense

I

An employer-employee relationship exists between the Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. and its members and International Union of Operating Engineers, Local No. 701.

WHEREFORE, International Union of Operating Engineers, Local No. 701 prays that the Amended Complaint be dismissed.

(Signature line omitted in printing)

APPENDIX E: STIPULATION OF FACTS

Before the National Labor Relations Board
(Title omitted in printing)

It is stipulated and agreed by and between the International Union of Operating Engineers, Local No. 701, AFL-CIO (herein Engineers), by its attorneys Carney, Probst, Levak & Cornelius; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein AGC) by its attorneys Dezendorf, Spears, Lubersky and Campbell; Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein ABC) by its attorneys Souther, Spaulding, Kinsey, Williamson & Schwabe; and Dale B. Cubbison, Counsel for the General Counsel of the National Labor Relations Board, in order to effectuate the purposes of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, and to avoid unnecessary cost and delay:

1. The Charge, Affidavit of Service of the Charge, Complaint and Amended Complaint, Affidavits of Service of the Complaint and Amended Complaint, Answer of Engineers, Answer of AGC, and this Stipulation of Facts and the exhibits attached hereto, constitute the entire record in the above-referenced case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing and the taking of testimony or the submission of evidence before an Administrative Law Judge, and the issuance of a decision of an Administrative Law Judge; and that they desire to submit this case for findings of fact and conclusions of law and issuance of order directly by the Board.

2. Upon a charge filed by ABC, the General Counsel for the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, issued an Amended Complaint and Notice of Hearing herein on the 20th day of September, 1977. The original complaint issued on September 14, 1977.

3. (a) The Answer of Engineers to the Amended Complaint was duly filed with the Regional Director on the 3rd day of October, 1977.

(b) The Answer of AGC to the Amended Complaint was duly filed with the Regional Director on or about the 3rd day of October, 1977.

4. AGC is an association of employers engaged in all types of construction work throughout the entire state of Oregon and five counties in the southwestern portion of the state of Washington. The employer-members of AGC, including H. A. Andersen Co., Inc. have delegated their collective bargaining authority to AGC for the purpose, *inter alia*, of negotiating and entering collective bargaining contracts on behalf of its employer-members with the bargaining representatives of their employees including Engineers. During the past year, the employer-members of AGC in the course and conduct of their business, annually purchased goods, materials, and supplies valued in excess of $50,000 which were shipped to said employer-members directly from states of the United States other than the states of Oregon and Washington.

5. AGC is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the act.

6. Engineers is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. AGC has collective bargaining agreements with six different labor organizations including Engineers. The agreement between AGC and Engineers was entered into on or about June 1, 1975, and expires May 31, 1980 (Exhibit A attached and herein called Master Agreement). Engineers is party to labor contracts with, and represents employees of many contractors in Oregon and Southwest Washington who do not belong to AGC.

8. The Master Agreement contains the following provisions:

Article VIII

Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction,

alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

At all times material herein, and continuing to date hereof, Engineers has continued and is continuing to give effect to Article VIII and Article IX, and since November 22, 1976, has reaffirmed these Articles, and has attempted to enforce Article VIII by filing grievances against AGC employer-members pursuant to the Master Agreement.

For example, Engineers filed a grievance (Exhibit B attached) on November 22, 1976, claiming that H. A. Andersen Co., Inc. violated the subcontractor clause (Article VIII) of the Master Agreement by subcontracting work covered by the Master Agreement to a subcontractor that did not have an existing labor agreement with Engineers covering such work, said subcontracting having occurred on Andersen's Fred Meyer Distribution Center construction project in Clackamas, Oregon. This construction project was a multi-million dollar project on which Andersen was general contractor. During the twelve month project there was a substantial period of time (approximately seven to eight months) when no Andersen unit employees represented by the Engineers were present on the jobsite.

On construction jobs performed by Andersen in Oregon and

southwest Washington during the last three years, there have been substantial periods of time when none of Andersen's unit employees represented by Engineers were present at particular jobsites. On the average there have been no such employees on particular Andersen jobsites 40 percent of the total days of the projects.

9. It is the general policy of AGC and its members including Andersen to abide by the subcontractor clause in the Master Agreement, and they will continue to do so unless a court or the National Labor Relations Board orders that the clause should not be enforced.

10. At all times material herein and continuing to date thereof AGC has continued and is continuing to give effect to Article VIII.

11. Solely for purposes of this proceeding it is stipulated that Engineers has neither threatened to picket nor has it in fact picketed AGC or any of its members to enforce Article VIII, Section 1.

12. The parties in negotiating and interpreting the Master Agreement, have agreed that the subcontractor clause at Article VIII, Section 1 is applicable at all times to all jobsites of the signatory employers regardless of whether or not the signatory employers themselves employ Engineers members at said jobsites.

13. The term "Union" employed in Article VIII, Section 1, means Engineers. Thus, Article VIII, Section 1 is applicable to preclude subcontracting job site work to the subcontractor who enters into a collective bargaining agreement with a union other than the Engineers to perform jurisdictionally relevant work.

14. AGC has approximately 200 contractor members. At any one time, one or more members of AGC employ members of Engineers under the terms of Exhibit A. The large marjority of AGC contractors employ members of Engineers on one or more projects in a given year.

15. Solely for the purpose of this proceeding, it is stipulated that one of the objectives of Engineers in agreeing to and implementing Article VIII of Exhibit A is to preserve work

opportunities for its members with AGC contractors.

16. Solely for the purpose of this proceeding from approximately 1960 to 1975 consecutive Master Agreements preceding Exhibit A have contained provisions almost identical to Article VIII and Article IX in Exhibit A.

17. This Stipulation of Facts is made without prejudice to any of the objections that any party may have as to the materiality or relevancy of any facts stated herein.

18. The parties to the Stipulation shall have 60 days from execution of this Stipulation to mail simultaneous briefs to the Board and the failure of any party to mail a brief within this time shall be a waiver of right to file such brief.

EXECUTED this 2nd day of December, 1977.

(Signature line omitted in printing)

APPENDIX F: EXCERPTS OF AGC—LOCAL 701 CONTRACT

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* * * * *

Article II
Territory

This Agreement shall cover the entire State of Oregon and the following area in the State of Washington: The Counties of Klickitat, Skamania, Clark, Cowlitz, Wahkiakum and that portion of Pacific County south of a straight line made by extending the north boundary line of Wahkiakum County west to the Pacific Ocean and the Pacific Ocean bordering the territorial jurisdiction of this Agreement.

Article III
Definitions

A. The term "Association" as used herein shall mean the OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. A roster of the Oregon-Columbia Chapter, Associated General Contractors of America, Inc., members who have assigned their bargaining rights, shall be furnished to the Union at the signing of this Agreement and thereafter upon acceptance of new members or withdrawal of said bargaining rights.

B. The term "Employer, Contractor or Employers" as used herein shall mean any individual, partnership, firm or corporation signatory, or who becomes signatory, to this Labor Agreement.

C. The term "Union" as used herein shall mean The

International Union of Operating Engineers, Local No. 701.

D. The term "Employee or Employees" as used herein, shall refer to any employed person or persons.

E. The term "Workman" as used herein, shall refer to any person in the labor market not employed.

F. The term "Subcontractor" as used herein shall refer to any person, firm or corporation who agrees with, orally or in writing, to perform or who in fact performs for, or on behalf of, an Employer, any part or portion of work covered by this Agreement.

G. The term "Authorized Representatives" as used herein, shall mean the Chapter Manager of the A.G.C. and the Business Manager of the Union or their representatives.

H. The term "Operating Engineer" or "Operator" as used herein, shall refer to any person who is a bargaining unit employee under the jurisdiction of the International Union of Operating Engineers, Local No. 701 regardless of the classification or type of work performed.

* * * * *

Article V
Recognition and Security

Section 1. The Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and all other Employers signatory or who become signatory hereto; hereby recognize and acknowledge Local No. 701 of the International Union of Operating Engineers as the sole and exclusive collective bargaining representative of all employees covered by this Agreement.

It is understood that the Union does not have jurisdiction over employees of the contractor as defined and excluded by the Labor Management Relations Act of 1947, as amended, and it being further understood that these employees shall not use the tools of the craft covered by this Agreement.

The International Union of Operating Engineers, Local No. 701 hereby recognizes the Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., as the sole and exclusive bargaining representative for their respective members.

Section 2. All workmen employed by the Employers to perform work covered within this Agreement shall become members of the Union not later than the eighth (8th) day following the beginning of such employment, and shall maintain membership in good standing in said Union as a condition of employment.

Section 3. All written requests by the Union for removal of employees for non-payment of or failure to tender initiation fees and dues, or for not being dispatched will be recognized and accepted by the Employers. The Employers agree to immediately remove the named employees from employment on all work covered by this Agreement.

Article VI
Agreement Binding Upon Parties

(a.) The Employers signatory hereto, understand and agree that one of the primary purposes of this Agreement is to "stabilize conditions of work in the area" by establishing uniform rates of pay, working conditions, etc., which are uniformly imposed on all Employers. Therefore, the Employers signatory hereto, or who become signatory, understand and agree that this Agreement shall cover and be binding throughout the duration of this Agreement.

* * * * *

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Section 2. Nothing in paragraph 1 of this Article shall be construed to prevent or discourage Pre-Job Conferences between the Union, the contractor and the proposed subcontractor for the purpose of reaching mutual agreement upon the work to be done by the subcontractor.

Section 3. The Employer shall be responsible and liable for payment of all sums of money required by all terms of this

Agreement incurred by any subcontractor. The parties agree the Administrative Trust Office shall notify an Employer within thirty (30) calendar days of any and/or all delinquent payments of monetary contributions due the Trust Office by any and/or all subcontractors used by said Employer. The Employers further agree they will notify the Administration Trust Office of any and/or all subcontractors (company name and address) used by said Employer on any job and/or project. If the Employer has notified the Trust Office of said subcontractors and the Trust Office should fail to notify the Employer within the specified time limitations, then the Employer shall be relieved of all responsibility for the subcontractor's delinquent payments to the applicable Trust Funds.

* * * * *

Article XI
Hiring

1. The Employer and the Union recognize that they are required by law not to discriminate against any person with regard to employment or Union membership because of age, race, religion, color, sex, national origin, or ancestry and hereby declare their acceptance and support of such laws. This shall apply to hiring, registration for employment, placement for employment, training, rates of pay or other forms of compensation, lay-off or termination, and application for admission to Union membership.

2. Workmen covered by this Agreement have certain accrued rights or benefits for themselves and their dependents. Such rights are generally continuous while under employment and remain effective until a certain period of time after lay-off or discharge.

3. It is recognized within the construction industry the Union affords the prime source of qualified workmen (Operating Engineers). The Employers shall hire qualified Operating Engineers by telephone from the Union dispatcher. Whenever the Employer requires Operating Engineers on any job or project, he shall notify the Local Union dispatch office by telephone, stating the location, starting time, approximate duration of the job, the type of equipment to be operated, the

work to be performed and the number of workmen required. The Union shall give the Employer the dispatch number assigned to each workman ordered by the Employer at the time the order is placed.

4. Any Joint Venture shall have the rights of any of its component individual Employers, and any reorganized company shall retain the privileges of its former position under this Article.

5. The Employer shall have the right to transfer any or all Operating Engineers employed by said Employer from one job or project within Local No. 701's territorial jurisdiction to another job or project within Local No. 701's territorial jurisdiction. The Employer shall notify Local No. 701's dispatch office prior to starting work on said job or project. It is understood and agreed for purposes of this Agreement that operations out of a fixed location are considered as one job.

6. The Union through pre-job conference can allow, Employers signatory to this Agreement, to select key workmen from the Group I 'Out of Work List.'

7. The Union, through Pre-Job Conference or by virtue of a Memorandum of Understanding between the bargaining representatives of this Agreement and the bargaining representatives of other geographical areas, may make provisions to allow certain key employees to be brought into the territorial jurisdiction of Local No. 701. Such employees shall be allowed to remain on the job or project in the classification for which they were cleared (dispatched), only for that project's duration. Such employees shall not be transferred to another project, acquire Group I status and/or recall privileges by virtue of such employment.

8. The transferring of employees and the hiring of key employees by an Employer signatory to the National Pipeline Agreement for work performed under said Agreement shall be done according to the provisions of said Agreement. However, such employees shall be allowed to remain on the job or project in the classification for which they were cleared or dispatched, only for that project's duration. Such employees shall not be transferred to another project, acquire Group I status and/or any

recall privileges by virtue of such employment.

9. The referral procedure as contained herein shall be followed except that, (a) requests by employers for key men to act as foreman shall be honored without regard to the requested man's place on the out-of-work list, providing the requested workmen are members of the Operating Engineers and have been employed by the contractor requesting said workmen within the preceding twelve (12) month period; however, at no time shall the requested Operating Engineer foreman (requested from outside Local 701 jurisdictional area) exceed 50% of the Operating Engineer foremen employed on any job or project, (b) requests by employers for a particular man previously employed by the employer within the geographical area of this Agreement and who has been laid off or terminated by the employer within two (2) years previous to the request shall be honored without regard to the requested man's place on the out-of-work list, provided said employee was originally dispatched to the requesting employer in accordance with the terms and conditions of this Agreement, (c) when the employer has a bona fide need he may order Operating Engineers with special skills and abilities. The dispatcher shall attempt to refer persons possessing such skills and abilities in the order in which their names appear on the out-of-work list, (d) employees previously selected by the Employer as a foreman or supervisor may not be requested under the terms of this Article for any work classification other than foreman or supervision.

10. Upon written request of an Employer, signed by a senior representative of the Employer on a job or project and delivered to the Union hiring hall, stating that such Employer desires, on the basis of past satisfactory service in the industry or with the Employer, that a named Group I Employee who either (i) has for the immediately preceding fifteen (15) year period been employed or available for employment in one or more classifications contained within this Agreement, such employment shall have been within the jurisdictional area of Local No. 701, or (ii) who has for the immediately preceding ten (10) year period been employed or available for employment in one or more classifications contained within this Agreement

and has been during said ten (10) year period employed by the Employer requesting said workmen for a period of six months or more, such employment shall have been within the jurisdictional area of Local No. 701, be dispatched in a particular classification to such job or project. The Union Hiring Hall shall dispatch such Employee in such classification to such job or project, provided such employee is registered at the Union Hiring Hall (on the Out-of-Work List) at the time of the receipt of the written request, and not on the payroll of another Employer and provided, further, that no Employee shall be laid off or discharged to make room for such named Employee. It shall be the Employee's responsibility to establish proof of the above mentioned years of employment. He may do so by any means of objective criteria. Any employee hired by virtue of this paragraph (written request) may not be discharged for any reason other than just cause and cannot be laid off for a period of fifteen (15) available work days, for which the workman shall be employed. Any employee discharged or laid off in violation of this paragraph shall be made whole by the Employer.

11. The Union shall utilize the Health & Welfare, Vacation, Pension and Union records in establishing these accrued rights based on length of employment.

12. Registration or re-registration of applicants for referral shall be accepted by the Union without regard to age, race, color, sex, creed or national origin, at any time during its customary office hours. All applicants shall be registered in order by the date of registration. Group III applicants must contact the Union dispatch office every thirty (30) days or their names shall be struck from the list.

13. Upon the request of an Employer for men, the Union shall refer qualified Operating Engineers to that Employer in sufficient number required by the Employer in the manner and under the conditions specified in this Agreement from the list in the following order of referral, provided any order received by the Dispatch Office after 2:30 p.m., cannot have a reporting time for employees ordered for any time during the Day Shift following placement of such order, but may be placed for the

second or third shift for the day following placement of said order.

(a) Workmen shall be referred from Group I on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be nondiscriminatory and where workmen have equal criteria, all referrals from Group I will be in successive order as their names appear on the out-of-work list, and when Group I has been exhausted;

(b) Then, workmen from Group II shall be referred on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be nondiscriminatory and where workmen have equal criteria, all referrals from Group II will be in successive order as their names appear on the out-of-work list and when Group II has been exhausted;

(c) Then, workmen from Group III shall be referred on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be non-discriminatory and where workmen have equal criteria, all referrals from Group III will be in successive order as their names appear on the out-of-work list.

14. All Operating Engineers except as elsewhere noted in this Article shall be hired and/or rehired in accordance with the length of service with Employers in the Collective Bargaining Unit from the following three groups:

Group I — Workmen who have been employed in work classifications covered by this Agreement and have accrued Group I status prior to the signing of this Agreement or persons who have been employed by an Employer or Employers, party or parties to this Agreement, as an Operating Engineer, for an aggregate time of 1,000 hours or more in each of three (3) consecutive calendar years shall be classified Group I on April 1 of the calendar year immediately following the third (3rd) such consecutive calendar year.

(a) Once a workman has acquired Group I status he shall retain such status as long as he accumulates an aggregate time of at least 300 hours as an Operating Engineer during any four (4)

consecutive calendar years. Failure to meet the above requirements will result in loss of Group I status and on April 1, of the calendar year immediately following the fourth (4th) consecutive calendar year, be classified as a Group II workman.

(b) Workmen who have acquired Group I status shall have such status extended for any period of incapacity, military service, employment by a public, quasi-public or Government agency on the type or kind of craft work covered by this Agreement, employed as a Supervisor for an Employer signatory to this Agreement, employed by the Union, employed on any Union related training program, becomes an owner-operator, is transferred to a job or project in another geographical area or overseas on the type or kind of craft work covered by this Agreement and is continuously employed as such prior to returning to this territorial jurisdiction.

Group II — Workmen who have been employed by an Employer or Employers, party or parties to this Agreement, as an Operating Engineer, for an aggregate time of less than that required for Group I status:

(a) All workmen who have completed a training program participated in or sanctioned by Local No. 701, shall by virtue of the experience obtained in the training program acquire Group II status.

(b) Once a workman has acquired Group II status he shall retain such status by being employed by an Employer or Employers, party or parties to this Agreement for an aggregate time of at least 1,000 hours each calendar year. Failure to acquire 1,000 hours in any calendar year will result in loss of Group II status and on April 1, of the calendar year immediately following such calendar year, be classified as a Group III employee.

Group III—All workmen who do not meet the requirements of either Group I or Group II:

(a) Workmen in Group III shall be dispatched in such a manner that those with the most experience in the trade shall be dispatched first and those with the least experience in the trade, last.

(b) Workmen in Group III who are dispatched on two occasions for work which they say they are qualified to perform, and who fail to qualify for such work may not be dispatched again during that calendar year.

15. The Employer may reject any employee or applicant for employment dispatched by the Union Hiring Hall, provided, however, that any such employee shall be compensated as provided for in Article XIII of this Agreement.

16. Any workman who is rejected by the Employer shall be restored to his place on the list for his Group. When a workman is referred for employment and is employed less than thirty (30) days, he shall be restored to his place on the out-of-work list for his Group, less the number of days he worked.

17. In the event that the referral facilities maintained by the Union are unable to fill the requisition of an Employer for workmen within forty-eight (48) hours after such requisition is made by the Employer (Saturday, Sunday and holidays excluded), the Employer may employ applicants directly at the job site: provided, however, this forty-eight (48) hour time limit shall cease upon a workman's acceptance of a dispatch from the Union. If applicants are hired at the job site the Employer shall notify the Union of the names and dates of such hirings within forty-eight (48) hours of such hirings (Saturday, Sunday and holidays excluded).

18. Any employee employed by the Employer in violation of this Article shall forfeit all priority rights, and shall be removed from the job and re-registered at the bottom of the appropriate list for this Group. Should the Employer fail to terminate such employee after receipt of written notice, the Union may take any economic action against the Employer it deems necessary and shall not be in violation of this Agreement.

19. If a workman accepts a job referral from the Union and does not report to the job site for work, or if a workman is terminated for just cause, he shall be reregistered at the bottom of the appropriate list for his Group.

20. All employees of the Union who are members of the Union and all employees of Union or joint training programs,

employees of the International Union of Operating Engineers and all employees heretofore or hereafter advanced by their Employer to a supervisory position, shall upon returning to the employment of an Employer as an employee and/or registering on the out of work list under this Agreement do so with the same preference as if they had continually worked as employees for Employers.

21. An employee who has attained Group I or Group II status and enters military service shall retain such Group status at the time of discharge.

22. Whenever an employee is discharged and is not eligible for rehire the Union shall be notified in writing. Without notice to the Union in writing the employee shall be eligible for rehire. Termination slips stating why terminated should be given to all employees at time of termination.

23. When an Employer has Operating Engineers' equipment on the job and does not have an Operating Engineer employee available on the job site for the work to be performed he shall obtain an Operating Engineer under the terms and conditions of this Agreement. If an operating engineer is not available the Employer may temporarily use other employees when vacancies are caused by sickness, or other unavoidable absence beyond the control of the Employer. Such work shall in no way prejudice the Union's jurisdiction. When an Operating Engineer becomes available he will man the equipment.

Preferred Status For Employment

1. The Employers and Union recognize that because of technological advances requiring high speed production, injuries, job accidents, health and/or age, there are a great number of workmen within the construction industry who have provided many years of service to the industry, but who cannot now physically perform the work required of them on most jobs. However, they can be utilized on special jobs requiring less physical effort. Therefore, by agreement of both parties, a "Preferred List" of jobs shall be established and only those workmen qualified for "Preferred Status" be employed on such jobs.

2. Workmen registering on this Preferred List shall:

(a) Be ineligible to register and shall not register for work in any classification other than those specified in this Preferred Status for Employment section.

(b) Be fifty-five (55) or more years of age and have had at least ten years employment or availability for employment, in one or more classifications contained in this Agreement of the type or kind of craft work covered by this Agreement, in the territorial jurisdiction of Local No. 701. Also, workmen who do not meet such requirements but have a physical handicap preventing his employment in any classification except those specified in the Preferred List, and who has acquired a Group I status, or acquired such handicap as a result of a job accident while employed as an Operating Engineer, will be permitted to so register.

3. It is understood and agreed that this section pertaining to "Preferred Status for Employment" shall supersede all other hiring provisions of this Agreement.

4. The Employer shall call the Union Dispatch Office for all workmen required in the following classifications and shall not use workmen who were dispatched to perform work in other classifications except in cases of emergency. The preferred list shall pertain to pumps, air compressors, generators, elevators, hoists, grade rollers, tractors pulling a roller or compactor, welding machine operator, bell boy or radio operators and all other jobs of similar nature for which the Employer, when requesting a workman if or when required to be referred, agrees to use a workman from the preferred list.

5. Workmen registered on the Preferred List shall be dispatched in the order that they registered except that workmen will only be dispatched to jobs for which they are capable of performing. Workmen shall be dispatched from the Preferred List until the list is exhausted, then workmen shall be dispatched in accordance with the hiring provisions of this Article.

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Article XVI

Health Laws and Safety Measures

Section 1. The contractor and the employees shall comply

with all applicable Federal and State laws governing safety. The contractor shall provide safeguards, safety devices and protective equipment to protect the life and health of employees on the job. The employee shall use all protective equipment required, shall perform his work in a safe manner and shall comply with the contractor's safety regulations.

Section 2. Cool clean drinking water containers with cups (and salt tablets) shall be kept in close proximity to the workmen.

Section 3. The Employer shall furnish all safety equipment (such as hard hats, goggles, earplugs, hat liners if needed or required). The Employer shall furnish physical examinations when required by state or federal agencies. Physical examinations shall not be required by the Employer.

Section 4. The Employer should notify the Union immediately of all injuries of a critical nature and shall furnish all details of such injury.

Section 5. In case an employee believes the foreman has instructed him to work under hazardous conditions, he shall have the right to refuse to do so; however, he may be assigned to other work. No employee shall be terminated for refusing to work under hazardous conditions.

Section 6. The Employers and the Union agree that no employee shall work on any job or project alone during the hours of darkness.

Section 7. There will be safety meetings held on the job site, during working hours, at such times as the Employer shall designate to discuss problems of safety. Such meetings shall be held on the Employer's time and the Job Steward may assist the Employer in conducting safety meetings.

Section 8. To insure safety, to eliminate unncessary occupational accidents, and to protect the employees from the elements, the employers agree that:

(a) Equipment shall be properly cabbed, screened and roll-over type cabs or canopies installed. Curtains, umbrellas, heaters, summer and winter fans shall be installed as necessary to protect the employees. Small equipment, e.g., curb extrusion

machines, ditch witches, small dozers or loaders used where a height obstruction (such as inside buildings, under conveyor belts, etc.) would prevent the installation of a canopy, will not require a canopy. However, every effort shall be made to insure that these small pieces of equipment are utilized in a safe manner. Additionally, asphaltic and concrete paving machines and surfacing rollers shall only be required to meet OSHA standards. However, adequate weather protection must be provided to protect the employees (not protective clothing).

(b) The Employer shall use his best efforts to eliminate noise and fumes from exhaust on equipment.

(c) The seats on all equipment must have reasonable padding and comfort for the Operator and shall be maintained.

Section 9. If an Operator finds it necessary or otherwise refuses to operate a machine because of safety, it shall be a violation of this Agreement for the Employer to reassign that machine until it has been checked out by a qualified operating engineer master mechanic, mechanic foreman or equipment foreman (if the job does not have such, then the superintendent) and properly repaired.

Section 10. No Operating Engineer employee, while operating a piece of "heavy equipment," shall cross either a highway or train track without the Employer providing flagmen or signal light. In lightly traveled areas this provision shall not apply unless required by an agency or owner.

Section 11. Any employee injured on a job or project while working for an Employer shall be rehired by said Employer whenever the employee is released from the doctor to return to work, providing there is a job available that he can be assigned to. If no job is available, he shall be given preferential treatment in Article XI (Hiring). Such injured workman shall be given an out-of-work date coinciding with the date of the job accident.

Section 12. Both parties agree that Operating Engineers working in the construction industry may be subjected to various inherent, hazardous conditions such as heat, smoke, dust, noise, etc. which could be detrimental to their health, therefore, both parties pledge their mutual cooperation in rectifying such conditions.

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Article XVIII
Operating Conditions

Section 1. All parties to this Agreement pledge to use their best efforts to improve productivity in the construction industry. To insure good productivity, every man on the job should be productively engaged in work for his full time on the job. Toward this end, the parties to this Agreement have established a Productivity Board as provided for in the addendum to this Agreement.

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Article XX
Tools

A. HEAVY DUTY REPAIRMEN and/or WELDERS

Section 1. Heavy duty repairmen and/or welders shall furnish their own hand tools up to and including three-quarters (3/4) inch drive. However, the Employer shall furnish all special tools as needed, such as: socket wrenches and sockets over three-quarters (3/4) inch drive, hand wrenches two (2) inches or over, pin presses, spanner wrenches, air or electric wrenches, testing and measuring devices other than a hand rule, gear and bearing pullers, electric drills, reamers, taps and dies, oxy-acetylene hoses, gauges, torches and tips, twenty-four (24) inch pipe wrenches, jacks, comealongs, bars other than small cat bar, twenty-four (24) inch crescent wrenches and hammers over five (5) lbs.

Section 2. The Contractor agrees to provide an adequate, dry and safe place for the storage of employee's tools which may be necessary in the performance of his work. The Contractor agrees that while such tools are in the Contractor's custody, and providing that the employee has locked these tools in an adequate tool box, the Contractor will carry insurance or assume personal liability therefor to cover the full value of such tools which may be lost because of fire, flood or theft (through forced entry). Tools broken in the course of employment will be replaced or reimbursement therefor will be made by the Employer upon the presentation of satisfactory evidence.

In order to obtain the benefits of this paragraph, a Heavy Duty Repairman and/or Welder must provide the individual Employer with an inventory of his tools at the time he commences work and an additional inventory every thirty (30) days. If the inventory is to be checked by the Employer it shall be on the Employer's time.

Section 3. Heavy Duty Repairmen and/or welders shall not rent, lease, or otherwise furnish their own transportation on the job or project.

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Article XXIII
Preservation of Work

The parties signatory hereto understand and agree that a primary purpose of this Agreement is to perserve to the bargaining unit employees covered by this Agreement work which has traditionally been performed by them.

Article XXIV
Health and Welfare

1. In addition to the wage scales and other monetary provisions listed in this Agreement and/or Schedule "A" herein, all persons firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing A.G.C.-Operating Engineer Trust Fund, for the purpose of providing health and welfare benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with all requirements of the Trust Agreement. The applicable provisions of the existing Trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article, the Union is free

to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Trust Fund created and/or perpetuated by this Agreement and/or prior Agreements, shall be the Operating Engineer Health and Welfare Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Trust Fund is for the purpose of providing Health and Welfare benefits to the Operating Engineer employees covered by this Agreement and their families.

Article XXV
Pension

1. In addition to wage scales and other monetary provisions listed in this agreement and/or Schedule "A" herein, all persons, firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing A.G.C.-Operating Enqineer Trust Fund, for the purpose of providing pension benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with all requirements of the Trust Agreement. The applicable provisions of the existing Trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article of the Agreement, the Union is free to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Trust Fund created and/or perpetuated by this Agreement and/or prior Agreements, shall be the Operating

Engineer Pension Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Trust Fund is for the purpose of providing Pension benefits to the Operating Engineer employees covered by this Agreement, and their families.

Article XXVI
Vacation

1. In addition to wage scales and other monetary provisions listed in this Agreement and/or Schedule "A" herein, all persons, firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing Operating Engineer-Employer Vacation Fund, for the purpose of providing vacation benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with the requirements of the Trust Agreement. The applicable provisions of the existing trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article, the Union is free to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Vacation Fund created and or perpetuated by this Agreement and/or prior Agreements, shall be the Operating Engineer Vacation Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Vacation Fund is for the purpose of providing Vacation benefits to the Operating Engineer employees covered by this Agreement, and their families.

APPENDIX G: DECISION AND ORDER OF NLRB

Before the National Labor Relations Board

International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

and

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.

Upon charges filed by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein called ABC), on April 26, 1977,[1] and duly served on International Union of Operating Engineers, Local No. 701, AFL-CIO (herein called Engineers), and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.(herein called AGC), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 19, on September 20, issued and served on Respondents an amended complaint and notice of hearing. The complaint alleges that Respondents entered into an agreement containing a subcontracting clause and an intertwining self-help provision whereby AGC and its employer-members have agreed to cease doing business with other persons in violation of Section 8(e) of the National Labor Relations Act, as amended (herein called the Act). On October 3, 1977, Respondents filed, and duly served on ABC and the General Counsel, their answer to the amended complaint in which they denied the commission of any unfair labor practices.

Thereafter, on December 2, 1977, Respondents, ABC, and counsel for the General Counsel entered into a stipulation of facts and motion to transfer the proceedings to the Board, wherein they agreed that the charges, the amended complaint, the answer to the amended complaint, and the stipulation of facts, including the exhibits attached thereto, shall constitute the entire record herein and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waive hearing before an Administrative Law Judge,

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[1]All dates are 1977, unless otherwise indicated.

the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and desire to submit these cases for findings of fact, conclusions of law, and Order directly by the Board. The parties, however, expressly limited the stipulation of facts for the purposes of this proceeding only. In addition, the parties reserved the right to object to the relevancy, materiality, or competency of any of the facts stated in the stipulation.

On January 16, 1978, the Board issued an order approving the stipulation and transferring the proceedings to the Board and set a date for the filing of briefs. Thereafter, Respondents, ABC, and the General Counsel filed briefs in support of their respective positions. In addition, briefs *amici curiae* were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America.[2]

Pursuant to a notice of hearing issued by the Board on February 8, 1978, oral argument in this case and related proceedings[3] was held before the Board in Washington, D.C., on February 23, 1978. In addition to arguments presented by the parties involved in the several proceedings, permission to argue orally as *amici curiae* was granted to the Chamber of Commerce of the United States of America, the American Federation of

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[2]The Chamber's brief is primarily addressed to the issues raised in 239 NLRB No. 42, but also speaks to issues raised by this proceeding.

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[3]*Colorado Building Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 NLRB No. 41 (1978); *Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly Associates)*, 239 NLRB No. 42 (1978); *Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke Romero Framing, Inc.)*, 239 NLRB No. 40 (1978).

Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Laborers International Union of North America, AFL-CIO.

The Board has considered the entire record herein as stipulated by the parties, the briefs of the parties and the *amici curiae*, and the oral arguments made to the Board, and hereby makes the following findings and conclusions:

I. The Business of Respondent AGC

Respondent AGC is an association of employers engaged in the construction industry throughout Oregon and part of the State of Washington. The employer-members of AGC, including H. A. Anderson Company, Inc., have delegated their collective-bargaining authority to the AGC for the purpose of, *inter alia*, negotiating and entering into collective-bargaining contracts on behalf of its employer-members with the bargaining representatives of their employees, including Engineers. The employer-members of AGC, in the course and conduct of their businesses, annually purchased goods, materials, and supplies valued in excess of $50,000, which were shipped to said employer-members directly from States of the United States other than the States of Oregon and Washington. The parties stipulated, and we find, that AGC is, and has been at all times material herein, an association of employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and we find, that Respondent Engineers is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

1. Is the subcontracting clause, article VIII, section 1, contained in Respondents' current collective-bargaining agreement proscribed by the general provision of Section 8(e) of the Act, and, if so, is the clause protected by the first proviso thereto?

2. If lawful by itself, does the subcontracting clause in Respondents' current collective-bargaining agreement, when read in conjunction with articles IX and X, violate Section 8(e) of the Act?

B. The Stipulated Facts

As stated, AGC has at all material times herein been an organization of employer-contractors which has been delegated authority for the purpose of negotiating and entering into collective-bargaining agreements on behalf of its employer-members with the bargaining representatives of their respective employees, including Engineers.

On or about June 1, 1975, AGC and Engineers entered into a collective-bargaining agreement, effective June 1, 1975, through May 31, 1980, which contained, *inter alia*, the following relevant provisions:

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Section 3. The Employer shall be responsible and liable for payment of all sums of money required by all terms of this Agreement incurred by any subcontractor. The parties agree the Administrative Trust Office shall notify an Employer within thirty (30) calendar days of any and/or all delinquent payments of monetary contributions due the Trust Office by any and/or all subcontractors used by said Employer. The Employers further agree they will notify the Administration Trust Office of any and/or all subcontractors (company name and address) used by said Employer on any job and/or project. If the Employer has notified the Trust Office of said subcontractors and the Trust Office should fail to notify the Employer within the specified time limitations, then the Employer shall be

relieved of all responsibility for the subcontractor's delinquent payments to the applicable Trust Funds.

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

Article X
Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement and/or any addendum relating thereto.

At all times material herein, Engineers has continued, and is continuing, to give effect to article VIII and article IX and has attempted to enforce article VIII by filing grievances against AGC employer-members pursuant to the master agreement.

Engineers, for example, filed a grievance on November 22, 1976, claiming that H.A. Anderson Company, Inc., violated the subcontractor clause by subcontracting work covered by the master agreement to a subcontractor that did not have an existing contract with Engineers covering such work, the subcontracting having occurred on an Anderson construction project in Clackamas, Oregon. During the 12-month period of the project, there were substantial periods of time when no Anderson unit employees represented by Engineers were present on the jobsite.

C. Contentions of the Parties

1. The subcontracting proposals

The General Counsel, Respondent AGC, and ABC all contend that the subcontracting provision in the current AGC-Engineers collective-bargaining agreement is proscribed by Section 8(e) of the Act. Specifically, General Counsel, Respondent AGC, and ABC urge that the clauses here are secondary and not privileged by the construction industry proviso to Section 8(e) of the Act because they are at substantial variance with the Supreme Court's discussion of the construction industry proviso in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). Furthermore, General Counsel, Respondent AGC, and ABC urge that, even if the subcontracting clause herein is privileged by the proviso to Section 8(e), the "self-help" provision in article IX of the collective-bargaining agreement removes whatever protections this clause might otherwise enjoy under the proviso.

Respondent Engineers contends initially that the subcontracting clause in issue is a lawful "primary" clause aimed at protecting unit work, with "unit" being defined as the unit coextensive with the scope of the multiemployer bargaining association. Beyond this, Respondent Engineers contends that, even if the subcontracting clause herein is secondary in nature, it is nonetheless privileged by the construction industry proviso to Section 8(e). Finally, Respondent Engineers urges that article IX of its current collective-bargaining agreement with AGC is not a "self-help" clause of the type or character which the Board has found illegal under Section 8(e). Instead, Engineers urges that the "enforcement" aspects of article IX are aimed at the enforcement of the grievance-arbitration machinery in the contract rather than to the use of economic action to force compliance with the subcontracting provision itself.

D. Discussion and Conclusions

1. The subcontracting clause

Turning initially to the subcontracting clause itself, we must determine whether the clause is primary or secondary in nature.

If the clause is primary, then Section 8(e)[4] has no application whatsoever, and the Union may engage in whatever actions it could otherwise take absent the restraints of Section 8(e). On the other hand, if the clause is secondary, then Section 8(e) and the proviso come into play and limit the procedures which may be utilized to obtain or enforce the operation of the clause.

The subcontracting clause in the instant case provides that employers signatory to the Engineers-AGC agreement shall not subcontract any jurisdictionally relevant work to any subcontractor who does not have an existing labor agreement with the Union ("union" is defined by the parties as Engineers). By its terms the clause herein permits performance of unit work by employees covered under other labor agreements with Engineers and not shown to be within the bargaining unit covered by the agreement between Respondents. Accordingly, the primary or secondary character must be evaluated by an examination of whether the conditions of the clause are limited to a requirement that subcontractors observe "the equivalent of union wages, hours and the like."[5]

Clearly, the clause herein does not limit subcontracting to firms which pay the equivalent of the contract wages, hours,

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[4]Sec. 8(e) provides that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing with any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work ....

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[5]*Local 437, International Brotherhood of Electrical Workers, AFL-CIO (Dimeo Construction Co.)*, 180 NLRB 420 (1969).

etc., contained in the Engineers-AGC agreement, but instead limits subcontracting to "signatory" firms. This type of union "signatory" clause is the type which we have consistently held is not concerned with the preservation of primary unit work, but one aimed at limiting the firms to those which AGC members may subcontract.[6] Therefore we find that article VIII herein is a secondary clause.

Having determined that the clause is secondary, however, we must now consider the contentions of the General Counsel, Respondent AGC, and ABC that the clause is not protected by the construction industry proviso to Section 8(e) because of the Supreme Court's decision in *Connell Construction Co., supra.*

In *Woelke Romero Framing, Inc.*, companion case to the instant one and also issued this day, we concluded that the Supreme Court's *Connell* decision construed the construction industry proviso to Section 8(e) to permit subcontracting clauses such as the one contained in the Engineers-AGC contract herein. For the reasons expressed in *Woelke Romero, supra,* we find that the subcontracting clause in the instant case is privileged by the construction industry proviso to Section 8(e).

Having determined that the subcontracting clause herein is secondary but nonetheless privileged by the proviso to Section 8(e), we now turn to the General Counsel's, Respondent AGC's, and ABC's contentions that the subcontracting clause is not privileged because it allows for the enforcement of the clause by other than judicial means.

Although Congress, by its enactment of the proviso to Section 8(e), made lawful certain secondary clauses in the construction industry, it nevertheless made clear that such agreements could not be enforced by the threats, restraint, or

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[6] *Heavy, Highway, Building and Construction Teamsters Committee for Northern California, IBT (California Dump Truck Owners Association),* 227 NLRB 269 (1976)(then-Member Fanning and Member Jenkins dissenting in part).

coercion prohibited by Section 8(b)(4).[7] This reflected the sense of Congress that, although such agreements could be lawful, the existing law with respect to the nonjudicial enforcement of secondary clauses should not be altered. Thus, in the conference report accompanying the 1959 amendments, the committee set forth that "[t]he proviso [to Section 8(e)] applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4)."[8]

When viewed in the context of the 1959 amendments generally, it thus appears that, in limiting the enforcement of valid "hot cargo" agreements in the construction industry to judicial means only, Congress did not intend that the proviso to Section 8(e) could be utilized or interpreted so as to allow the inclusion in collective-bargaining agreement provisions which would have the forseeable effect of authorizing 8(b)(4) violations.[9]

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[7]Sec. 8(b)(4)(ii)(B) provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) ... (ii) to threaten, coerce, or restrain any person engaged in commerce or an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease ... doing business with any other person ...

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[8]I. Leg. Hist. 943 (LMRDA, 1959).

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[9]Then Senator Kennedy explained in a discussion of Sec. 8(e) that:

Agreements by which a contractor in the construction industry promising not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e) ... Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) ....

It is not intended to change the law with respect to the judicial enforcement of these contracts .... [II Leg. Hist. 1433 (LMRDA, 1959).]

This Board, in a long line of decisions,[10] has consistently adhered to the views expressed by Congress with respect to the prohibition on economic action to enforce secondary agreements under the construction industry proviso. The Board (with court approval) has thus held that clauses which purport to authorize a union to employ economic action to enforce secondary subcontracting provisions will serve to remove whatever protections the secondary clause would otherwise enjoy under the proviso to Section 8(e).[11]

The main focus of our analysis of self-help clauses and their legality has been to determine the relationship between the clause purporting to authorize economic action and any secondary clauses limiting the subcontracting of work. In other words, subcontracting clauses and clauses authorizing the union to engage in economic action independent of one another, i.e., when a union's right to engage in economic action specifically excludes a subcontracting clause from its application, do not violate Section 8(e). It is only when the Board determines that the parties intended that the economic enforcement provisions apply to the subcontracting clauses that

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[10]*Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (AFL-CIO), (Greater Muskegon General Contractors Assn.),* 152 NLRB 360 (1965); *Ets-Hokin Corporation,* 154 NLRB 839 (1965); *Local 437, International Brotherhood of Electrical Workers, AFL-CIO (Dimeo Construction Co.),* 180 NLRB 420 (1969); *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J.K. Barker Trucking Co.),* 181 NLRB 515 (1970); *Fresno, Madera, Kings and Tulare Counties Building and Construction Trades Council (Gage Brothers Construction),* 218 NLRB 39 (1975); *International Union of Operating Engineers, Local No. 12 (Robert E. Fulton),* 220 NLRB 530 (1975).

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[11]See *Muskegon Bricklayers Union #5, supra,* enfd. 378 F.2d 859 (C.A. 6, 1967); *Ets-Hokin Corp.,* enfd. *sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO and its Local Union No. 769,* 405 F.2d 159 (C.A. 9, 1968).

violations of Section 8(e) will be found.[12] The Board has found that "self-help" clauses remove otherwise proviso-protected agreements from the scope of that proviso even though the self-help and subcontracting provisions are found in different articles of the agreement,[13] even if the remedy the union seeks would be the same if achieved by lawful judicial means,[14] and although the means of enforcement reserved by the union were not strictly limited to strikes or picketing.[15]

In the instant case, while the limitations on subcontracting are technically linked to the contract's grievance-arbitration machinery, article IX nonetheless reserves to the Union the right to take "whatever action it deems necessary" for enforcement at any step of the grievance procedure or for a violation of the applicable time limits for fringe benefit contributions. Furthermore, while article X, section 1, generally provides for no strikes, it is limited by the language "unless otherwise provided herein." Article IX, in turn, allows for whatever action deemed necessary for enforcement with the understanding that such action shall "not be considered in violation of *any part* of this agreement." (Emphasis supplied.)

Taken together, articles IX and X compel the conclusion that strikes or other economic action which would otherwise be prohibited under article X are allowed under article IX as an "action deemed necessary" by the parties to enforce the grievance-arbitration procedure. Further, it is clear that a dispute arising under the Article VIII restrictions on

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[12]*General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, supra.*

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[13]*International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), supra.*

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[14]*Muskegon Bricklayers Union #5, supra.*

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[15]*Fresno, Madera, Kings and Tulare Counties Trades Council, supra.*

subcontracting would be submitted to the grievance-arbitration procedures for settlement. If one party subsequently failed to comply with the settlement, the other party, under article IX, is accorded the right to take "any action deemed necessary" to enforce the settlement.

As noted above, Respondent Engineers contends that any economic action that the Union may choose to employ is not strictly to enforce the subcontracting provision in article VIII, but is instead action taken to enforce the findings and/or time limits grounded in the grievance-arbitration provision. Engineers in effect argues that a violation of Section 8(e) is avoided here because the Union has not reserved the use of economic force with respect to the subcontracting clause *per se*, but has reserved the right to take self-help as it relates to the grievance-arbitration provision.

The grievance-arbitration procedure, however, is simply an agreed-upon method for the resolution of disputes arising under specific provisions of the contract between the parties. As such, it is necessarily connected to the contract provisions which are the source of the disputes submitted for resolution. We therefore hold that the immediate object of a self-help clause (here, the grievance procedure) will not serve to obscure the underlying dispute which gives rise to a claim of liability (in this case, the enforcement of a secondary clause). The effect of a holding to the contrary would be to insulate self-help clauses (as applied to secondary provisions) through the device of the grievance procedure. Read together, articles VIII, IX, and X sanction economic action to insure compliance with the subcontracting provisions of article VIII. This result serves to remove article VIII from the protection it would otherwise enjoy under the proviso to Section 8(e). Recalling that in its enactment of the proviso to Section 8(e) Congress intended that agreements privileged by that proviso be enforced only through lawsuits, it is clear that if the underlying claim giving rise to liability under article IX, section 5, is rooted in a secondary clause the fact that there is an intermediate stage before the Union may resort to economic action does not alter the fact that the contract allows the Union to employ "non-judicial acts of a compelling or

restraining nature, applied by way of concerted self help"[16] for the enforcement of a secondary provision. Accordingly, we find that article VIII of the 1975–80 AGC-Engineers agreement is violative of Section 8(e) of the Act.[17]

The Remedy

Having found that Respondents have engaged in unfair labor practice, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

Conclusions of Law

1. The Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., is an association of employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 701, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to self-help provisions applicable to article VIII of their 1975–80 collective-bargaining agreement, Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL-CIO, violated Section 8(e) of the Act.

4. The above unfair labor practice is an unfair labor practice affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

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[16] *Local Union No. 48, Sheet Metal Workers International Assn. v. Hardy*, 332 F.2d 682 (C.A. 5, 1964).

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[17] Member Murphy emphasizes that all five Board Members, including her dissenting co-league, agree that the actual use of economic action to enforce a clause protected by the construction industry proviso under Sec. 8(e) violates the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and mail to its employer-members copies of the attached notice marked "Appendix A."[18] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent AGC, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondent AGC to insure that said notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order, what steps Respondent AGC has taken to comply herewith.

B. Respondent International Union of Operating Engineers, Local No. 701, AFL-CIO, Portland, Oregon, shall:

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[18]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[19] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent Engineers, shall be posted immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Engineers to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent Engineers has taken to comply herewith.

Dated, Washington, D.C. November 13, 1978

CHAIRMAN FANNING, dissenting:

I agree with the finding that the Supreme Court decision in *Connell* construed the construction industry proviso to permit subcontracting clauses in the context of a collective-bargaining relationship as in this case. However, for reasons stated in my dissenting opinion in *Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (AFL-CIO) (Greater Muskegon General Contractors Association),* 152 NLRB 360 (1965), I dissent from the finding that the subcontracting clauses are outside the protection of the proviso because of self-enforcement provisions. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. November 13, 1978

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[19]See fn. 18, *supra.*

Appendix A

Notice to Employees and Members

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce that portion of article IX, section 5, permitting "such action as (deemed) necessary," to the extent that such action is authorized to maintain, to give effect to, or enforce the subcontracting clause, article VIII, of the collective-bargaining agreement between Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL-CIO, and to the extent that article IX, section 5, violates Section 8(e) of the National Labor Relations Act.

OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206–442–7472.

APPENDIX H: OPINION OF THREE JUDGE PANEL

Before the United States Court of Appeals for the Ninth Circuit

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner

v.

National Labor Relations Board, Respondent

(Remainder of title omitted in printing)

Before: SNEED and KENNEDY, Circuit Judges, and EAST,* District Judge

SNEED, Circuit Judge:

Construction contractors challenge in these cases the legality of a provision in a collective bargaining agreement which prohibits a signatory contractor from assigning work to subcontractors unless the subcontractors have a collective bargaining agreement with the signatory union. The National Labor Relations Board has ruled that such a provision does not violate the prohibition in the National Labor Relations Act (the Act) against "hot cargo" agreements.[1]

In deciding these cases we must determine the scope of the Supreme Court's holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). We hold that under *Connell* the clauses before us are not lawful under section 8(e) of the Act, 29 U.S.C. § 158(e), and are not within the construction industry proviso of section 8(e).

Our jurisdiction rests on 29 U.S.C. § 160(e) and (f) (1976).

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

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[1]A hot cargo provision, so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials—or, as in this case, the services—of nonunion employers.

I.
Factual Background

Two decisions of the Board are before us for review. The first considered the legality of a collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), which is an association of approximately 200 employers engaged in construction in Oregon and southwest Washington, and the International Union of Operating Engineers, Local 701 (Engineers). The agreement, effective from June 1, 1975 through May 31, 1980, contains a provision precluding AGC employers from assigning jobsite work covered by the agreement to any subcontractor which does not have a current labor agreement with Engineers.[2] Another provision makes violations of the agreement subject to a grievance and arbitration procedure, and the results of arbitration are enforceable by "such action as they [the parties] deem necessary . . ." This article would thus permit enforcement of the agreement, including the subcontractor clause, through strikes or picketing.

Following a charge filed by another association of construction employers, the General Counsel of the NLRB issued a complaint alleging that the agreement's subcontractor clause and enforcement provision violate section 8(e) of the Act.[3] The case was heard by the Board upon stipulated facts and

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[2]The subcontractor clause provides in pertinent part as follows:

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

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[3]Section 8(e) provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or

it held that, while the subcontractor clause fell within the general proscription of section 8(e), the clause was protected by the section's construction industry proviso. However, the Board invalidated the self-help enforcement provision insofar as it authorized economic sanctions in support of the subcontractor clause. All parties petitioned this court for review and modification of the Board's order. The Board, of course, seeks enforcement of its order.

The second decision of the Board which we review considered challenges to a proposed collective bargaining agreement which locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), sought to establish with Woelke & Romero Framing, Inc. (Woelke), a framing subcontractor who has performed work for various construction contractors in southern California. Between 1974 and 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, and, beginning on June 3, 1977, Woelke commenced negotiations with Carpenters concerning a successor arrangement. Two provisions of the proposed new agreement generated contention. One of these provisions forbade Woelke to subcontract jobsite work except with firms having a current labor agreement with Carpenters.[4] The second

> otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .
>
> 29 U.S.C. § 158(e) (1976).

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants,

provision included foremen within the unit of employees whom Carpenters would represent. According to the parties' stipulations, foremen function as supervisors and also as Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances. Impasse over these provisions led to the termination of negotiations on August 4, 1977. Thereafter, Carpenters picketed Woelke at four jobsites. As a consequence of this picketing, employees of the subcontractors of general contractors at two of the jobsites refused to work.

Upon charges filed by Woelke, the General Counsel of the NLRB issued a complaint against Carpenters. After hearing the case upon stipulated facts, the Board decided that the proposed subcontractor clause was protected by the construction industry proviso. It follows, the Board held, that picketing by Carpenters did not violate the prohibition in section 8(b)(4)(i) and (ii)(A) of the Act, 29 U.S.C. § 158 (b)(4)(i) and (ii)(A).[5] Before reaching

> asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The proposed agreement also contains an alternative subcontractor clause, applicable in the event that the principal clause should be invalidated, which would prevent subcontracting with any firm unless the firm's employees belong to a union and unless the subcontractor agrees to comply with the full terms of the labor agreement between Woelke and Carpenters. We accept the Board's conclusion that the alternative provision is merely a disguised union signatory clause, since in practice only a subcontractor affiliated with Carpenters could satisfy its requirements, some of which are unrelated to any legitimate primary interest of the bargaining employees.

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[5]Section 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry

this conclusion the Board held that but for the construction industry proviso the proposed subcontractor clauses would violate section 8(e).

In addition, the Board concluded that bargaining to impasse and picketing intended to compel the unionization of Woelke foremen constituted a violation of section 8(b)(l)(B) of the Act, 29 U.S.C. § 158(b)(1)(B),[6] and ordered Carpenters to desist from this practice.

The Board requests enforcement of this order. Woelke seeks reversal of the Board's decision with respect to the subcontractor clause.

We shall discuss first the critical issue of these cases, *viz.* the scope of the construction industry proviso as applied to the subcontractor clauses involved in each case. Thereafter the remaining issues pertinent to each case will be addressed.

II.

Scope of the Construction Industry Provisio

Our analysis will proceed as did that of the Board. That is, we shall initially determine whether these clauses fall within the

> affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .
>
> 29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).

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[6]Section 8(b)(1)(B) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances [sic]; . . .
>
> 29 U.S.C. § 158(b)(1)(B) (1976).

general proscription of section 8(e) and, inasmuch as we agree with the Board's conclusions that section 8(e) does proscribe these clauses, we shall then determine whether the clauses are, nonetheless, protected by the construction industry proviso. As already indicated, our conclusion with respect to the scope of the proviso differs from that of the Board.

A. Does Section 8(e) Proscribe These Clauses?

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. Reading section 8(e) literally there is no doubt but that section 8(e) proscribes such clauses. The problem is not that simple, however. In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), the Supreme Court read into section 8(e) a distinction between primary and secondary objectives. An agreement which advances only primary objectives of the bargaining employees, such as preserving work opportunities, is not unlawful. Thus, a court must consider:

> ... whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements ... were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] ... would be a neutral bystander, and the agreement ... would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer ... for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

Id at 644-45 (citations omitted).

Applying this standard, this court has recognized that a union signatory clause — as opposed to a union or area standards

clause, which merely requires that the employees of subcontractors work under the same terms and conditions as those enjoyed by union members—is normally secondary in nature. *Griffith Co. v. NLRB*, 545 F.2d 1194, 1199 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977). As the Second Circuit observed in *NLRB v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974): "[i]f the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units."

Nor can these clauses be regarded as valid work preservation provisions. They do not assure work opportunities for employees in the respective work units, i.e., employees of AGC or of Woelke; rather, they operate for the general benefit of the respective unions. Hence, neither provision is directed to "the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturers*, 386 U.S. at 645. We agree with the Board, therefore, that the subcontractor clauses fall within the general prohibition of section 8(e).

B. Does the Construction Industry Proviso Authorize These Clauses?

1. The Interpretation Required by Connell Construction Co.

In determining whether these subcontractor clauses are protected by the construction industry proviso, we encounter the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). There the union, as a result of picketing, had obtained a subcontractor agreement with a general building contractor even though the union did not represent or seek to represent the contractor's own employees. When the contractor challenged the agreement under the Sherman Act, the union defended, in part, by arguing that the agreement was expressly authorized by the construction industry proviso. Declaring that "section 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment," *id.* at 628, the Supreme Court

observed that the section was part of a program enacted to limit "top-down" organizing campaigns. The construction industry proviso, though an exception to the section's general proscription, should be construed so as not to undermine that objective. *Id.* at 628-33. The Court concluded that the subcontractor clause in that case was not covered by the proviso. It expressed its holding in the following manner:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only of firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

Id. at 635.

The Board in the cases here being reviewed emphasized heavily the Supreme Court's reliance on the absence of a collective bargaining relationship. Where this relationship exists it held union signatory clauses were within the construction industry proviso. The Board stated:

> "The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective bargaining relationship, and possibly without such a realtionship if the clauses are aimed at avoiding the Denver Building Trades [*NLRB v. Denver Building Trades*, 341 U.S. 675 (1951)] problems."[7]

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[7]The unions and the Board purport to find support for this interpretation of Connell in California Dump Truck Owners Ass'n v. Associated General Contractors of America, 562 F.2d 607 (9th Cir. 1977). Declining to find challenged provisions of a labor agreement unlawful under the antitrust statutes, this court in *Dump Truck* distinguished *Connell* with the observation that in *Connell* no collective bargaining relationship had existed. *Id.* at 613. However, *Dump Truck* did not involve interpretation of section 8(e), and its quotation from *Connell*

We disagree. We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subconcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite his employees who are members of the signatory union, and does not engage subcontractors whose employees are members of the signatory union, can engage nonunion subcontractors to perform work on that particular jobsite that otherwise would be done by members of the signatory union. To do so would not, in our opinion, violate a valid union signatory clause. To hold otherwise extends the construction industry proviso beyond the limits we attribute to *Connell*.

Our holding recognizes the validity of a provision in a collective bargaining agreement that with respect to any particular jobsite will preclude the possibility of members of the signatory union being required to share work with nonunion workers. Under a provision of this sort the employment of one member of the signatory union on the jobsite assures that all relevant work on that jobsite will be done by signatory union members. We believe this is a more accurate reading of Connell's holding than that of the Board.

was taken from a section of the *Connell* opinion which was not concerned with section 8(e). Moreover, the provision challenged in *Dump Truck* was not a union signatory clause; the provision did not prohibit employers from using nonunion subcontractors but merely required that such subcontractors receive a rate of pay not less than that of union employees, and that the union be notified when a non-union subcontractor was employed. *Id.*

We are not aware, moreover, of any decision of any other court of appeals which has read *Connell* as construing the construction industry proviso so as to protect all subcontractor agreements made in a collective bargaining context. The district courts which have considered the question have reached contrary conclusions. *Compare, e.g.*, Long v. Floorcraft Carpet Co., 82 Labor Cases ¶ 10,044, p. 16,151 (D.C. Ore. 1977), *with* In re Bullard Contracting Corp., 464 F. Supp. 312 (W.D.N.Y. 1979).

We acknowledge that the teaching of *Connell*, as applied to the issue we are considering, is not unambiguous. The Court stated that the construction industry proviso applies only to work performed at the jobsite and then added, quoting *Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir 1966), that some courts had assigned the proviso the "even narrower function" of alleviating "'the frictions that may arise when union men work continuously alongside nonunion men on the same construction site.'" *Connell*, 421 U.S. at 630. The Court's statement left open this "even narrower" view of the proviso's scope. However, since the subcontractor agreement in *Connell* occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What *Connell* left unanswered we must confront and answer.

2. Reasons In Support of Our Holding

We believe our response is supported by the proviso's background and statutory setting. Section 8(e) was enacted as part of the Labor-Management Reporting and Disclosure Act of 1959. The section was designed, as the Supreme Court noted in *Connell*, to strengthen the prohibition in section 8(b)(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. *Id.* at 628. However, the prohibition in section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and the more limited exception for the construction industry.

The unions and the Board contend that, at least with respect to agreements made within the context of collective bargaining, the proviso should be given the expansive scope which its literal terms suggest. Their argument can be stated syllogistically: At the time the proviso was enacted, the union signatory subcontractor provisions were lawful. The proviso was intended to preserve in the construction industry the law as it then existed. Hence, the proviso was intended, and should be construed, to protect subcontractor provisions.

The difficulty with this argument is that neither of the premises can be accepted without qualification. In 1959, when section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined. *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), the so-called *Sand Door* case which in the unions' view defined the state of the law at that time, involved an agreement forbidding the use of nonunion material, not a subcontractor provision. Moreover, the issue in *Sand Door* was whether union picketing and coercion designed to enforce a hot cargo provision was unlawful under section 8(b)(4), and the Court, although it indicated that a hot cargo clause was not *prima facie* evidence of illegal coercion under section 8(b)(4), *id.* at 108, expressly declined to consider "the invalidity of hot cargo provisions as such." *Id.* at 107. Thus, the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door.*

Furthermore, even if subcontractor clauses were lawful prior to the passage of the Labor-Management Reporting and Disclosure Act, it is unclear to what extent the construction industry proviso was intended to preserve the then current law. The unions rely upon statements made by Senator Kennedy and an extract from the Conference Report which suggest that the provisio would not change the law of the *Sand Door* decision. Yet in explicitly limiting the proviso's protection to jobsite work, Congress adopted a restriction which was never mentioned in *Sand Door.* Indeed, in the same paragraph which indicates that the law of *Sand Door* would be preserved, the Conference Report states that the proviso would not protect "agreements relating to supplies or products or materials . . . delivered on the site of the construction," which was precisely the kind of agreement at issue, and allegedly declared to be lawful, in *Sand Door.* H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, *reprinted in* I Legislative history of the Labor-Management Reporting and Disclosure Act of 1959 at 943 (1959). Hence, the broad assertion that the construction industry proviso was designed to leave the law unchanged is inaccurate. Congress may have intended to preserve existing

law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is.

We must, therefore, look to the purpose Congress sought to serve by enacting an exception for the construction industry. In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), this court surveyed the legislative history of section 8(e) and concluded:

> Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, "the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site." Drivers, Salesmen, Etc., Local 695 v. NLRB, 124 U.S. App.D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the union laborers are in frequent and relatively close contact with the union craftsmen.

The court's conclusion in *ACCO* is consistent with the Supreme Court's reasoning in *Connell*. *Connell* noted that the construction industry proviso resulted from efforts to overrule the holding of *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), in which the Supreme Court had ruled that union picketing which was intended to force a general construction contractor to terminate its contract with a nonunion subcontractor violated section 8(b)(4). *Connell*, 421 U.S. at 629. The *Denver Building Trades* decision was objectionable because, as Justice Douglas had argued in dissent, "[a]ll the union asked was that union men not be compelled to work *alongside nonunion men on the same job*." *Denver Building*

Trades, 341 U.S. at 692 (emphasis added). Thus, the purpose of the proviso was to permit unions and construction employers to avoid the tension and discontent that exists when members of a union are required to work on the same jobsite with nonunion workers of the same craft or trade.[8] Our holding permits the avoidance of precisely that source of tension and discontent.

We cannot extend the provisio's protection beyond the purpose for which the exemption was created without creating a shield of immunity for agreements which we believe Congress wished to prohibit. Hence, the purpose of the exception dictates its scope. A subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of jobsite friction between union and nonunion employees of a particular craft or trade does not

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[8]The employer petitioners argue further that the proviso was not intended to protect *particular union* clauses, i.e., agreements which require that an employer's subcontractors belong not merely to a union, but to the union which is party to the labor agreement containing the subcontractor proviso. This interpretation is based upon several statements by Senators indicating that the proviso would protect agreements precluding the use of "nonunion" (or, in a single instance, "unorganized") subcontractors. The employer petitioners interpret the term "nonunion" to refer only to firms not belonging to any union, and then make the negative inference that the proviso does not protect subcontractor clauses forbidding the use of firms which, though not associated with the signatory union, are not "nonunion" firms in this narrow sense. This inference is dubious at best and, in any event, the fragments of legislative history upon which these parties rely do not constitute conclusive evidence of the understanding of Congress as a whole. Moreover, this view of the exception would frustrate the purpose of the proviso, because jobsite friction might arise between members of competing unions as well as between union and nonunion workers. We therefore decline to take this restrictive view of the proviso's scope.

arise. Indeed, a general contractor that assigns no employees who are members of the signatory union to a particular construction project occupies the same position, with respect to that project and the signatory union, as the contractor in *Connell* which had no union employees at all. The fact that a contractor may employ signatory union personnel elsewhere is, for purposes of the proviso, irrelevant.

We find additional support for our interpretation of the construction industry exception in the proviso's statutory setting. Section 7 of the Act, 29 U.S.C. § 157, provides, with limited exceptions, that employees have the right to refrain from any or all union activities. In addition, if employees choose to unionize, they have the right to bargain "through representatives of their own choosing . . ." Although section 8(f) of the Act, 29 U.S.C. § 158(f), permits "pre-hire" labor agreements in the construction industry, that section does not override the workers' rights of self-determination. *Connell*, 421 U.S. at 632. A union signatory subcontractor clause operates to force nonunion firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. The agreement between AGC and Engineers, for instance, forecloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such a provision is manifest. The clause is thus precisely the kind of instrument for "top-down" organizing which the Supreme Court condemned in *Connell*. *Id.* at 631, 632. For those reasons, we believe that the position taken by the Board, which legitimates the use of such an organizing weapon by a union as long as the union has a collective bargaining relationship with the signatory employer, is improper.

III.
Remaining Issues

Having decided the principal issue raised by these cases, we now consider the proper disposition of each of the cases before us.

For the reasons elaborated in the preceding section, the subcontractor clause contained in the collective bargaining agreement between AGC and Engineers constitutes a violation of section 8(e). The clause in its present form, as section 8(e) provides, is unenforceable. Hence, we need not decide whether the agreement's self-help enforcement provision as applied to a lawful subcontractor clause would violate section 8(e).

The subcontractor provision proposed by Carpenters in negotiations with Woelke is also unlawful under section 8(e). Picketing engaged in by Carpenters in order to compel Woelke to accept the provision was thus a violation of section 8(b)(4)(i) and (ii)(A), and should have been enjoined by the Board. The Board's order is accordingly modified to enjoin Carpenters from picketing or using economic coercion for the purpose of inducing Woelke to enter into any agreement which contains such a provision. Our disposition of this issue makes it unnecessary to consider Woelke's additional contention that picketing intended to compel acceptance even of a lawful subcontractor clause is prohibited by section 8(b)(4)(i) and (ii)(A).

The Board requests enforcement of its order enjoining the use by Carpenters of picketing, strikes, or other coercion in order to compel Woelke to include within the bargaining unit foremen who are supervisors or Woelke's representatives for purposes of collective bargaining or the adjustment of grievances. Carpenters has not contested the Board's ruling that picketing or coercion used for this purpose constitutes a violation of section 8(b)(1)(B) of the Act. The Board's order with respect to this issue should be enforced.

The Board shall modify its orders in these cases to conform to the views expressed in this opinion, and those orders, as modified, are ordered enforced.

Enforced As Modified.

APPENDIX I: OPINION OF THE EN BANC PANEL

Before the United States Court of Appeals for the Ninth Circuit

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner

v.

National Labor Relations Board, Respondent

(Remainder of title omitted in printing)

BEFORE: BROWNING, Chief Judge, CHOY, WALLACE, SNEED ANDERSON, SCHROEDER, FLETCHER, FARRIS, NELSON, CANBY and NORRIS, Circuit Judges

CANBY, Circuit Judge

These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry proviso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontact work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.

Facts.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200

employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargaining agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

Article VIII

Subcontractors and Other Employers.

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Subsequent clauses[1] provide for a grievance procedure leading to arbitration and further provide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings . . . ." The effect of the latter provision is to permit

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[1]Other relevant clauses of the AGC agreement are:

ARTICLE IX

Settlement of Disputes

Grievance Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * * *

Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party . . . , then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings . . . and they shall not be considered in violation of any part of this Agreement.

ARTICLE X

Strikes and Lockouts

Section 1. Unless other wise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement . . . .

either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e)[2] of the National Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work ...." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and

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[2]Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work ...

Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), a group which included Locals Number 235 and 944 involved in this litigation. That agreement expired on June 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse over several issues.[3] One such issue was the union's demand for a clause in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locals were charged with violation of § 8(b)

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[3]Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foremen in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

(4)(i) and (ii)(A) of the Act[5] for picketing to require an employer "to enter into an agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso, and that picketing to obtain such a clause therefore did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

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[5]Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or other wise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing ....

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[6]Along with the present cases, reported at 239 N.L.R.B. 274 (1978) *(Pacific Northwest)* and 239 N.L.R.B. 241 *(Woelke)*, the Board decided *Los Angeles Building Construction Trades Council (Donald*

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because their applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate § 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of this court.

II.

Issues.

Four issues are presented for determination in these cases:

(1) Are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) to enforce them by picketing or strikes?

Schriver, Inc.), 239 N.L.R.B. 264 (1978), and *Colorado Building Construction Trades Council*, 239 N.L.R.B. 253 (1978). The Board's order upholding broad subcontractor agreements in *Schriver* was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. *Donald Schriver, Inc. v. NLRB*, Nos. 78-2177, 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

III.

Applicability of § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangements that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The Court therefore held that an agreement between a union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to preserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as primary and therefore did not constitute an unfair labor practice.[7] The test whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisiy union objectives elsewhere." *Id.* at 644.

By the *National Woodwork* test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees of the contracting employer by limiting the amount of subcontracting. Nor do they

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[7] "Union standards" clauses, which require that an employer not subcontract with any one whose wage and benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. *Truck Drivers Union Local No. 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *NLRB v. National Maritime Union*, 486 F.2d 907, 912 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

seek to protect the wage and benefit standards of those same employees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit. *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977); *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. *NLRB v. National Maritime Union*, 486 F.2d at 914. Second, § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that the clause falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation for the

employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union*, 196 N.L.R.B. 1100, 1101 (1972), enforced 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. *See NLRB v. National Maritime Union, supra*, at 913-14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, *NLRB v. Denver Building Construction Trades*, 341 U.S. 675 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon their eligibility for inclusion within the construction industry proviso to that section.

IV.

Scope of the Construction Industry Proviso to § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). Indeed, it is the effect of *Connell* that provides the primary ground of controversy in the present litigation. We believe, however, that the *Connell* decision is best analyzed after a review of the state of the industry and the legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959); *I Legislative History of The Labor-Management Reporting and Disclosure Act of 1959* 423 (hereinafter Leg. Hist.). These peculiarities of the construction industry created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisy [sic] these needs, unions and employers hammered out a number of mutual accommodations. One such arrangement was the closed shop,

which was prevalent in the industry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular employers.[10] A third device was the agreement to restrict subcontracting in various ways—to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially caused no disruption in the

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[8]Haber, Industrial Relations in the Building Industry 238-40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. *Id.* at 240.

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[9]Dunlop, *The Industrial Relations System in Construction,* in The Structure of Collective Bargaining 255, 256-57 (Weber ed. 1961).

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[10]S. Rep. No. 187, *supra,* 28; I Leg. Hist. 424. *See generally,* Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

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[11]A union attempt to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. *Levering Garrigues Co. v. Morrin,* 71 F.2d 284 (2d Cir.), *cert. denied,* 293 U.S. 595 (1934).

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[12]Marcus, *Secondary Boycotts,* in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961)(hereinafter referred to as LMRDA Symposium).

pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over that industry.[13] The Taft-Hartley Amendments to the Act, passed in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refrain from dealing in the products of any other employer or to cease to do business with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. *Guy F. Atkinson Co. and J.A. Jones Construction Co.*, 90

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[13] *Brown and Root, Inc.*, 51 N.L.R.B. 820 (1943); *Johns-Manville Corp.*, 61 N.L.R.B. 1 (1945).

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[14] The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 *supra*.

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[15] Denham, *Taft Act's Impact on the Construction Industry, reprinted in* 21 L.R.R.M. 44 (1948). The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board decided United *Ass'n of Journeymen Apprentices of Plumbing and Pipefitting Industry (Brown-Olds)*, 115 N.L.R.B. 594 (1956), and *Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific)*, 119 N.L.R.B. 883 (1958), *remanded on other grounds*, 270 F.2d 425 (9th Cir. 1959). Apruzzese, *The LMRDA and the Building and Construction Industry*, LMRDA Symposium, note 12, *supra*, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. *See* Fenton, *Union Hiring Halls: NLRB Rules, Penalties*, 42 L.R.R.M. 101, 103 (1958).

N.L.R.B. 143 (1950), *enforcement denied on other grounds*, 195 F.2d 141 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. *NLRB v. Denver Building Construction Trades Council*, 341 U.S. 675 (1951). The picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the construction industry were sufficiently disruptive of existing practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong. Rec. 111, [1954] U.S. Code Cong. & Admin. News 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted ... under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S. Doc. 10, 86th Cong., 1st Sess.; 105 Cong. Rec. 1297; I Leg. Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time—that of limiting "hot cargo" agreements.

In June 1958, the Supreme Court had decided *Local 1976, United Brotherhood of Carpenters v. NLRB, (Sand Door)*, 357 U.S. 93. *Sand Door* stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, id. at 107, *Sand Door* was widely

interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished the congressional purposes in various ways. The clearest accommodation to the peculiar conditions of the construction industry was found in § 8(f),[16] which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts to an exception to § § 8(a)(1),(2) and

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[16]Section 8(f), 29 U.S.C. § 158(f), provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective bargaining agreement before the union represents a majority of employees in the unit. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961); *see NLRB v. International Association of Bridge, Structural Ornamental Iron Workers*, 434 U.S. 335, 344-45 (1978). Section 8(f) also shortened to 7 days the period for nonunion workers to join the union under a union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the *Sand Door* decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry

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[17]S. 1555, 1 Leg. Hist. 582.

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[18]H.R. 8342 as amended by H.R. 8400, I Leg. Hist. 683.

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[19]H.R. Rep. No. 1147 (Conference Report) 86th Cong., 1st Sess. 38-40; I Leg. Hist. 942-44 (1959).

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[20]The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states:

Provided further, That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry ....

proviso excepted agreements "relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work .... "

It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed at the construction site. Although the matter is not free from doubt, we believe that the legislative history favors the latter view.

(C) Legislative Discussion of the Construction Industry Proviso.

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong. Rec. 17899; II Leg. Hist. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements

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[21]There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. *See, e.g.*, 105 Cong. Rec 17381, II Leg. Hiwt. 1385 (Senators Javits and Goldwater); 105 Cong. Rec. 15538, II Leg. Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong. Rec. 15848; II Leg. Hist. 1680 (Rep. Teller).

between a union and an employer by which the employer would boycott others. The Conference Committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements ... To the extent that such agreements are legal today under section 8(b)(4) ... , the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39; I Leg. Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
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> ...
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> *Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be Legal today. They will not be unlawful under § 8(e) ....*
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> ...
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> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

105 Cong. Rec. 17900; II Leg. Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary objectives, which meant that the holding of *Denver Building*

Trades, supra, was left in effect. On the other hand, the Conference Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The *Sand Door* decision, *supra,* which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. *Operating Engineers Local Union No. 3 v. NLRB,* 266 F.2d 905 (D.C. Cir.), *cert. denied sub nom. St. Maurice v. NLRB,* 361 U.S. 834 (1959).[22] While that case dealt

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[22]The *Engineers* decision was submitted to the House committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation, 803-07 (1959) (herafter [sic] House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in *Engineers,* appeared before the Committee and testified as to the scope of the subcontracting clause:

> The contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses [sic] says that any time an AGC contractor subcontracts work the

with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement, the Court erred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms complying with the terms of the prime employer's agreement. Lunden, *Subcontracting Clauses in Major Contracts,* 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The

> subcontractor must agree to apply the terms and conditions of the AGC operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers local 3.
>
> Since about 1955, the AGC and the Operating Engineers *have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.*
>
> 5 House Hearings 2366 (Emphasis supplied).
>
> Although the *Engineers* decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's attention. Senate Hearings 752 (Testimony of Sen. Curtis).

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[23]Office of the General Counsel, Memorandum 76-57, December 15, 1976, *reprinted in* Labor Ralations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards clauses, the General Counsel found that study "inconclusive." *Id.* at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. *Id.* at 309.

survey canvasses various limitations appearing in subcontracting clauses in the construction industry, but makes no mention of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. *Id.* at 715-16. That there may not have been a consistent pattern of subcontractor agreements of the type in issue here is not crucial What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) The Connell Decision.

It was against this industrial and legislative background that the Supreme Court decided *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Connell was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees. The picketing was successful and the contractor sought to annul the ensuing agreement on the grounds that it violated the antitrust laws.[24]

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[24] *Connell* was another chapter in the dispute in Dallas between building contractors and trade unions. In *Dallas Building Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968), a clause similar to the one in *Connell* was at issue. Unlike Connell, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days by § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the unions picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General

One of the defenses raised by the union was that the agreement could not be a violation of the antitrust laws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme Court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attack the subcontracting clauses in the present case argue that *Connell's* language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So interpreted, *Connell* would invalidate the agreements in issue here at least until the presence of union workers at a particular jobsite triggered their application. We concede at the outset that the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the *Connell* decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevailing thrust of *Connell* is to the contrary and favors a broader [sic] view of the exemption. Our conclusion is supported in particular by the *Connell* opinion's emphasis on the absence of a collective bargaining relationship, its references to legislative history, and its characterization of the interests served by the

Counsel refused to issue a complaint. *See Connell,* 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631-32 n. 10.

When Local 100 began picketing Connell, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of *Connell* from the present cases is that the agreements in *Connell* arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in *Connell*:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

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[25]But for the *Connell* decision, we would have no difficulty in enforcing the Board's order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. *See, e.g., Construction, Production Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); Suburban Title Center Inc., v. Rockford Building Construction Trades Council, 354 F.2d 1, 2-3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966); *United Association of Journeymen Apprentices of the Plumbing and Pipefitting Industry, Local 48*, 190 N.L.R.B., 415, 416-17 (1971).

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[26]*See Connell*, 421 U.S. at 622-23; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and section 4, 5 and 13 of the Norriss-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. *Connell, supra*, 622-23. *See generally*, R. Gorman, Basic Text on Labor Law, 621-31 (1976).

421 U.S. at 626.[27] The focus of the *Connell* decision was therefore understandably upon the situation created by subcontracting clauses in the absence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of *Connell*, however. The parties themselves had framed the issues toward the same end. The union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship . . . ," but not those involving a "stranger" contractor. *Id.* at 627.[28] The subject of controversy, then, was the validity of subcontractor agreements *outside* of the collective bargaining context, and the *Connell* opinion must to a large degree be read

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[27]The fact that *Connell* was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, *infra* p. ____ , but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, of course, is frequently contrary to that of the antitrust law. *See* St. Antoine, *supra*, n. 26.

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[28]The briefs in *Connell* concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to *Connell*. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished in the *Connell* opinion as being " . . . addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10. (emphaiss in original).

in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold that this agreement, which is outside the context of a collective bargining relationship and not restricted to a particular jobsite, ... may be the basis of a federal anti-trust suit ....

Id. at 635. The holding of *Connell,* then does not in the strict sense control the cases before us.

The *Connell* opinion did, however, discuss at length the reach of § 8(e) and its construction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language of *Connell* and apply it to the situation of the cases at bar where a collective bargaining relationship existed between the unions and the contractors with whom the agreements were sought.[29] A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of *Connell,* remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the *Connell* opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between union and nonunion

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[29]In *Woelke,* the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during neogiations sic to renew the contract. In *Pacific Northwest,* the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in *Donald Shriver Inc. v. NLRB,* Nos. 78-2177 and 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

workers there. These two themes—the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite —are interwoven in *Connell* as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer—contractor or subcontractor—is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As Congress recognized in passing § 8(f), collective bargaining cannot even await the presence of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand, the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. *National Woodwork, supra,* at 644-45; *National Maritime Union, supra.* We do not quarrel with this well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. *NLRB v. Denver Building Construction Trades Council,* 341 U.S. 675, 689 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside of the construction industry pursue secondary objectives.

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the *Connell* situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in *Connell* disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that *one* of these characteristics is that union workers are traditionally hostile to

the presence of non-union workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements may lead to multiple employers hiring a few workers for short periods of time,[30] and where working conditions applicable to one set of workers may very well affect others working on the same project.[31]

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[30]The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the average, each firm employed six construction workers. U.S. Bureau of the Census, Census of Construction Industries (1977), *cited in* Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.
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> . . . [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, *The Building Trades and Title VII of LMRDA*, in LMRDA Symposium, *supra*, note 12, at 1034, 1043.

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[31]*See Donald Schriver Inc., supra*, slip op. at 43-46.

We believe that the *Connell* opinion is sensitive both to the interconnection of interests between employees of the various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in *Connell* points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628-29. The legislative history discussed above indicates, we believe, that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in *Connell* dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that *Connell* was dealing with a case not considered by Congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the *Connell* opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to overrule" *Denver Building Trades*, 421 U.S. at 629. *Denver Building Trades* had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The *Connell* opinion refers to congressional discussion of special problems in the construction industry related both to the § 8(e) proviso and to

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[32] In *Connell*, the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in *Operating Engineers*, *supra*, as well as the House and Senate Hearings, *supra*, note 24, suggest that Congress was well aware of the existence of these clauses.

the attempt to overrule *Denver Building Trades*. That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secondary boycott ban is based upon the concept of two employers—a primary and a secondary employer. The theory is that a neutral employer should not be compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
>
> The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations. He lets those

[33]Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong. Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: *Douds v. Metropolitan Federation of Architects, Engineers, Chemists Technicians, Local 231, (Project Engineering Co.)*, 75 F. Supp. 672 (S.D.N.Y. 1948).

> contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong. Rec. 17880-81; II Leg. Hist. at 1425. Even where the sources cited by *Connell* deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the members in secondary employ. The memorandum by representatives Thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
>
> ... [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong. Rec. 15541; II Leg. Hist. 1577. These materials cited by the *Connell* Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The *Connell* opinion quotes *National Woodwork Manufacturers, supra,* to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at 630, quoting 386 U.S. at 638-39. It is clear that the *Connell* opinion views the jobsite considerations of *National Woodwork* as going well beyond the problem of friction among workers,[34] because *Connell* next refers to some courts that have suggested that the proviso serves an "even narrower function"—the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* at 630, quoting *Drivers Local Union No. 695 v. NLRB,* 361 F.2d 547, 553 (D.C. Cir. 1966). The *Connell* opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the *Connell* case the union did not purport to represent *any* of the interests served by the proviso. 421 U.S. at 631.[35]

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[34]Indeed, *National Woodwork* contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32. That footnote refers to *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB,* 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. *The Impact of the Taft-Hartley Act on the Building and Construction Industry,* 60 Yale L.J. 673, 684-89 (1951), which discusses not only jobsite friction but also the additional considerations of interchangeability of workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employees at the jobsite.

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[35]Essentially the same situation was dealt with by this court in *ACCO Construction Equipment, Inc. v. NLRB,* 511 F.2d 848 (9th Cir. 1975). ACCO does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read

We believe that it would do some violence to the language of the *Connell* opinion to adopt the "even narrower" view of the construction industry proviso which the Court in *Connell* did not represent to be its own. Yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-to-shoulder jobsite friction can occur. Instead, we think that it is more in accord with the language of *Connell* to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

that as essential to its decision. *ACCO* was written before *Connell* and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interests" which are emphasized in *National Woodwork*, *Connell*, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

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[36]Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the *Connell* Court stated:

> [W]e think its authorization extends only to agreements in

the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

> the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that *Connell* does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) Practical Consequences.

Our reading of *Connell* to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it is supported by the severe practical limitations attending a

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[37]Our reading of the quoted language in *Connell* as presenting disjunctive alternatives rather than conjunctive and cumulative requirements is supported by the District of Columbia Circuit and probably by the Third Circuit. *Donald Schriver, Inc., supra; Larry V. Muko, Inc. v. Southwestern Pennsylvania Building Construction Trades Council*, 609 F.2d 1368, 1374-75 (3d Cir. 1979)(en banc). Lower courts and commentators have varied in their approach to the underlying issue. See *Landscape Specialties, Inc. v. Laborers' International Union, Local 806*, 477 F. Supp. 17 (C.D. Cal. 1979); *Long v. Floorcraft Carpet Co.*, 82 Labor cases ¶ 10,044 (D. Or. 1977); St. Antoine, *supra*, 62 Va. L. Rev. at 619; Janofsky & Hay, *Connell–Consistent with Past, Indicative of Future*, Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursuing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. If unions are confined to negotiating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of subcontracting agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted that the appearance of any union worker on the job triggers subcontracting agreements covering the entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are within the proviso of 8(e). First, there are overwhelming practical difficulties in

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[38]The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We belive that it is a more manageable task, however, to police jobsites to ensure that subcontractors working there have agreements with the policing union than it is to determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, the legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining agreements. Third, the *Connell* decision, which admittedly has language that might point to either result, may fairly be read to support the validity of subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true that the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.

Additional Issues.

It is contended by AGC that even if the construction industry proviso authorizes clauses requiring subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the

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[39] *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980). *Compare Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978), *and NLRB v. International Association of Bridge, Structural Ornamental Iron Workers*, 434 U.S. 335, 350-51 (1978), *with NLRB v. International Longshoremen's Association*, 100 S. Ct. 2305 (1980).

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[40] *See International Union of Operating Engineers, Locals 542, 542-A and 542-B, (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); General Counsel Memorandum, note 25, *supra*.

time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union" subcontractor agreement in a decision that was submitted to the House committee considering the 1959 amendments. *Operating Engineers Local Union No. 3 v. NLRB, supra;* 2 House Hearings 803-07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia Circuit in *Donald Shriver, Inc. v. NLRB, supra,* slip op. at 52-5. We also note that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The actual wording of § 8(b)(4)(ii)(A), however, prohibits coercion of any person *"to enter into any agreement which is prohibited by* [§ 8(e)]."[42] The negative

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[41]Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong. Rec. *18128;* II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong. Rec. 17900, II Leg. Hist. 1433. Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, *see* 105 Cong. Rec. 15516, II Leg. Hist. 1552 (statement of Rep. Madden), said that the question was left open for the courts to decide. 105 Cong. Rec. 19772, II Leg. Hist. 1858.

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[42](Emphasis supplied). Section 8(b)(4)(ii)(A) appears *supra* note 4.

implication of this provision is surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the Board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. *Construction Production Maintenance Laborers Union, Local 383 v. NLRB, (Colson Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964). The Board subsequently acquiesced in the courts' view. *Northeastern Indiana Building Construction Council*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuant to the grievance procedure.[43] The Board concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history makes clear Congress's

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[43]*See* note 1, *supra*.

intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 163-64 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969). We have also held that such clauses may be enforced by arbitration. *La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitration award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agreement to mean what it says. *Operating Engineers, Local No. 701 v. NLRB*, 578 F.2d 841, 842 (9th Cir. 1978); *Donald Schriver, Inc. v. NLRB, supra*, slip op. at 57-58.

VII.
Conclusion.

We find that provisions in a collective bargaining agreement forbidding the signatory employer to subcontract work at a

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[44]"The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the *Sand Door* case *Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. *See also*, 105 Cong. Rec. 17900, II Leg. Hist. 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it . . . ." 105 Cong. Rec. A8359, II Leg. Hist. 1830.

construction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employers to enter such agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently invalid. We accordingly enforce the orders of the Board in their entirety.

Pacific Northwest Chapter of the Associated Builders Contractors, Inc., et al. v. NLRB, et al.—Nos. 78-3469, 78-3487, 78-3619, 78-3468, 79-7011

SNEED, Circuit Judge, (with whom CHOY, ANDERSON and FARRIS, Circuit Judges, concur) dissenting:

As with many legal issues, where one ends up in this case depends upon where one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry proviso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches its conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting point, on the other hand, is with *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and its concern with the "top-down organizing" effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Pacific Northwest Chapter of the Associated Builders Contractors, Inc. v. NLRB*, 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. *Id.* at 1348-50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme Court in *Connell*.

____ F.2d ____ (p. 26 majority opinion). Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, is said not to have been a concern of the Supreme Court in *Connell* because in that case "the union did not purport to represent any of the interests served by the proviso." ____ F.2d ____ (p. 26). Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in *Connell* is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more emphathetic with *Connell's* concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union standards governing wages and working conditions, was more efficient than its competitiors [sic].

It must be acknowledged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-46 (1967); *see also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Johnson*, *368* F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrimination by employers." ____ F.2d ____ (p. 29). I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legislative history of the proviso. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975). In surveying the legislative history, we concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. *Id.* at 851; *accord, Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C.

Cir. 1966); *Essex County District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *International Union of Operating Engineers, Locals 542, 542-A and 542-B*, 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). I see no reason to depart from our earlier analysis of the purpose of the proviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong. Rec. 19785-86, 19809 (1959); II Leg. Hist. 1815-16 (extension of remarks of Senator McNamara and Representative Thompson); *contra* 105 Cong. Rec. 10004-05 (1959); II Leg. Hist. 1861 (extension remarks of Representative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As *Connell & ACCO* concluded, the legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction. *See, e.g.*, I Leg. Hist. 82 (message from President Eisenhower to Congress); 105 Cong. Rec. 15852, II Leg. Hist. 1684 (statement of Congressman Goodell); 105 Cong. Rec. 17333-34, II Leg. Hist. 1383-84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, it too strongly supports the conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong. Rec. 15541 (1959); II Leg. Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those challenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect

broad subcontractor clauses. I believe this reasoning gives far too much weight to the bare reference to the pattern of collective bargaining referred to in the Committee Report. *See Connell, supra*, 421 U.S. at 628-29. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That limitation at least partially overruled the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). *Connell, supra*, 421 U.S. at 632-33. The holding of the panel gets my nod.[1]

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[1]Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it

FARRIS, Circuit Judge, with whom Judge Choy and Judge Anderson join, dissenting:

I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to nonsignatory contractors. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . ." *Id.* The precise issue here is whether that proviso legalizes agreements that limit subcontracting at sites where the employer has no employees represented by the union. The majority holds that it does. I disagree.

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id.* at 633.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a

says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help cause in the AGC contract is invalid.

collective bargaining agreement to restrict an employer's subcontracting at the jobsite where it employs the union's members. The majority asserts that another purpose—maintenance of contract standards in the industry—requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. *See also Donald Shriver, Inc. v. NLRB*, No. 78-1277, slip op. at 43-47 & n. 29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. *See generally* Archibald Cox, Derek Bok & Robert Gorman, *Cases and Materials on Labor Law*, 892-95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

APPENDIX J: ORDER OF SUPREME COURT GRANTING CERTIORARI IN CASE NOS. 80-1798, 80-1808 AND 81-91

In The
Supreme Court of the United States
October term, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

The motion of Air Conditioning and Refrigeration Institute, et al. for leave to file a brief as amici curiae in Nos. 80-1798 and 80-1808 is granted. The motion of The Associated General Contractors of America, Inc. for leave to file a brief as amicus curiae in No. 80-1808 is granted. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.